RECORD AND BRIEFS.

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No. 16-992

In the Supreme Court of the United States

MARISA N. PAVAN, ET AL., PETITIONERS

v.

NATHANIEL SMITH, M.D., MPH

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondent strives to draw the Court's attention away from this central fact: under the Arkansas Supreme Court's decision, when a married woman gives birth in the circumstances petitioners did, her spouse, if male, will be named on the child's original birth certificate as a parent, despite having no biological relationship to the child, but her female spouse will not. Nowhere does respondent attempt to justify that disparate treatment of married same-sex couples. Instead, respondent engages in a series of distractions, including his central argument that petitioners should have challenged a different Arkansas statute that neither mentions birth certificates nor controls their issuance.

The Court should not be misled. Under this Court's decision in *Obergefell* v. *Hodges*, same-sex couples are entitled not only to obtain marriage licenses, but also to enjoy the rights and responsibilities of mar-

riage "on the same terms and conditions as opposite-sex couples." 135 S. Ct. 2584, 2605 (2015).

With narrow exceptions not applicable here, Arkansas Code § 20-18-401 (the Birth Certificate Law), Pet. App. 76a-79a, confers on the male spouse of a married woman the right to be named as a parent on the birth certificate of any child born during the marriage, regardless of whether he is the child's genetic father. Arkansas's denial of that right to same-sex spouses subjects those couples and their children to serious and continuing harms. It deprives their children of the stability and security given to other marital children, casts doubt on the integrity and equality of their families, and exposes them to a host of tangible indignities and harms. See Family Equality Council Amicus Br. 5-10; Family Law Profs. Amicus Br. 20-21; see also Pet. 5-7, 18-20. This Court's review is warranted by the profound importance of this issue to Arkansas families and to ensure that other states do not similarly flout this Court's decision in *Obergefell*.

A. Respondent Is Denying Petitioners Equal Enjoyment Of A Marital Right Under Arkansas Law, In Violation Of *Obergefell*

This Court's decision in *Obergefell* established that the fundamental right of same-sex couples to marry entails equal access to the rights, benefits, and responsibilities conferred to married couples by state law. When a state ties a right to marriage, that aspect of marital status must be afforded equally to same- and opposite-sex couples. See Pet. 16-18.

The right of the birth-mother's spouse to be named on a birth certificate is a benefit conferred by marriage under Arkansas law.[1] The statutes require the Arkansas Department of Health (ADH) to name a birth mother's male spouse on the child's birth certificate—even where the birth mother's spouse is not a biological parent—based solely on his marriage to the mother. See Pet. 21-23. By its express terms, Arkansas Code § 20-18-401(f)(1) states that "[i]f the mother was married at the time of * * * birth the name of the husband shall be entered on the certificate as the father of the child." Pet. App. 77a. Thus, in Arkansas, inclusion on a birth certificate is part of the "constellation of benefits * * * linked to marriage." *Obergefell*, 135 S. Ct. at 2601. And yet, under the decision below, Arkansas refuses to treat same-sex couples equally in this respect.

Rather than grappling with the constitutional question actually presented by this case, respondent mischaracterizes petitioners' arguments. Contrary to respondent's assertions (Br. 14-15), petitioners are not claiming an independent due process right to be named on a marital child's birth certificate. Rather, petitioners are seeking to vindicate their right to the full "con-

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[1] While "the States are in general free to vary the benefits they confer on all married couples," *Obergefell*, 135 S. Ct. at 2601, whether a given right is, in fact, an "aspect[] of marital status," *ibid.*, that must be given to all married couples "on the same terms and conditions as opposite-sex couples," *id.* at 2605, is necessarily a question of federal law, or else same-sex couples' constitutional right to marry would be "quite simply insusceptible of enforcement by federal courts." *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U.S 702, 726-727 (2010) (plurality opinion).

stellation of benefits" conferred on married couples under Arkansas law. *Obergefell*, 135 S. Ct. at 2600-2601. Indeed, "birth certificates" were among the rights of marriage specifically identified in *Obergefell* and were the basis of the suits brought by many of the plaintiffs whose claims this Court upheld. See *ibid.*; Pet. 19-20. By issuing birth certificates naming both spouses in opposite-sex married couples, but denying that benefit to similarly situated same-sex couples, Arkansas is flouting this Court's holding in *Obergefell*.

Respondent attempts to justify this disparate treatment by reference to the possibility of biological connections between an opposite-sex spouse and children of the marriage, but that effort fails. Respondent states that the Birth Certificate Law "generally *requires*" that the husband of a child's birth mother be named on the child's birth certificate, because "in the overwhelming majority of cases, the mother's husband is a marital child's biological father." Resp. Br. 17 (emphasis added). Respondent acknowledges, however, that a biological relationship with the child is not required for Arkansas to list the male spouse of the birth mother as the child's parent. *Id.* at 3-4. Under circumstances identical to those presented by the petitioners, where a married opposite-sex couple conceives using artificial insemination, the "husband would be deemed the child's natural parent" and "included on the child's birth certificate," "even though *he is definitively not the biological father*." *Ibid.* (emphasis added). Even assuming, as respondent asserts (Br. 17), that there is a biological relationship between the child and the birth mother's male spouse in most cases, that would not justify naming as parents male spouses who "definitively" lack a biological relationship while denying the same

right to similarly situated female spouses. It does not matter that respondent characterizes that well-established right as "a narrow exception." *Ibid.*[2] If Arkansas provides this protection for male spouses of birth mothers, it must do the same for female spouses.

Obergefell forecloses respondent's attempt to justify its disparate treatment of married same-sex couples based on biology. There, too, the states sought to defend their disparate treatment of same-sex couples on the ground that only opposite-sex couples have a capacity for biological procreation. The Court, however, rejected that as a reason to deny same-sex couples equal access to the institution of marriage and the accompanying aspects of marital status. See 135 S. Ct. at 2600-2601. Under *Obergefell*, because Arkansas gives married parents the right to be named on their children's birth certificates, including when the husband has no biological relationship to the child, the State may not invoke biology as a constitutionally sufficient reason to deny that right only to married same-sex couples.

Respondent's attempt (Br. 20) to defend the State's discriminatory treatment of same-sex couples on the basis of the State's interest in tracking a child's biological relationships is directly contravened by Arkansas's own laws. Not only do those laws often require the *exclusion* of a child's biological parent from a birth certifi-

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[2] Published guidance from the State suggests that the exception is not, in fact, so "narrow," and confirms that it applies in circumstances beyond artificial insemination. See p. 6, *infra* (discussing Department of Finance and Administration guidance); see also Pet. 22 (citing Arkansas caselaw limiting the circumstances under which an alleged biological father can seek to challenge a husband's paternity).

cate, they permit and sometimes require the *inclusion* of non-biological parents. Pet. 4-5, 21-23. According to guidance published by the State, "[w]hen a child is born to married parents, there is an *automatic* legal relationship between the child and the husband of the mother," even "if the husband knows he is not the father of her child." *Paternity*, Ark. Dep't of Fin. & Admin., http://www.dfa.arkansas.gov/offices/childSupport/custodialParty/Pages/paternity.aspx#faqs (emphasis added)). While the husband "*can* deny paternity," he may do so only "*if* the mother and biological father are in agreement." *Ibid.* (emphases added); see also Ark. Code § 20-18-401(f)(1)(B). And respondent concedes (Br. 3-4) that under Arkansas law a non-biological parent will be named on the birth certificate when a child is born to a married opposite-sex couple under circumstances identical to those of the petitioners here. The State cannot deprive same-sex couples of the equal dignity and protection of their marriages by selectively implementing a purported interest in recording a child's biological parentage only when a child is born to a married same-sex couple.

B. Petitioners Properly Challenged The Arkansas Birth Certificate Statute To Vindicate Their Right To A Birth Certificate

Respondent's claim that petitioners could have obtained the relief they sought by challenging Arkansas Code § 9-10-201(a) (the Artificial Insemination Law) has no merit. Petitioners seek original birth certificates naming both spouses as parents. The Artificial Insemination Law does not mention birth certificates nor direct the ADH to issue them. When ADH unconstitutionally denied petitioners a birth certificate naming both spouses, petitioners correctly challenged the

Birth Certificate Law that specifically governs ADH's issuance of birth certificates and was the law under which ADH was acting when it subjected them to disparate treatment.

Respondent nowhere explains how the Artificial Insemination Law could be read to govern ADH's duties with respect to issuance of original birth certificates. The Birth Certificate Law, which is part of the Vital Statistics Act, addresses the issuance of records related to "birth, death, marriage, divorce, or annulment," among other subjects. Ark. Code § 20-18-103. As with these other records, the issuance of a birth certificate is a purely administrative act. *Id.* § 20-18-401(a)-(c).[3] The Birth Certificate Law makes no reference to the Artificial Insemination Law as an alternate basis for ADH to issue birth certificates, nor does the Birth Certificate Law differentiate based on the manner in which a child born to a married couple is conceived.

The Artificial Insemination Law, by contrast, establishes the legal parentage rights of non-birth spouses to children born to the other spouse via artificial insemination. It appears in the "Paternity" chapter of the Family Law Title to the Arkansas Code, alongside other provisions detailing the rights and obligations of those deemed legal parents.[4] Respondent fails to ex-

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[3] As respondent notes, "ADH does not" even "independently investigate the vital information submitted by a hospital when a woman gives birth." Resp. Br. 2 (quoting Pet. App. 86a-87a).

[4] One provision of the Family Law does address the issuance of birth certificates, but applies only to surrogacy, which has no application here. Ark. Code § 9-10-201(c)(2). Pet. App. 75a. No similar provision exists in the Artificial Insemination Law.

plain on what authority he would issue petitioners birth certificates under the Artificial Insemination Law that would not also depend on ADH's authority under the Birth Certificate Law. In other words, respondent fails to show how even if petitioners had challenged the Artificial Insemination Law and won, that would have brought the relief they sought—issuance of birth certificates naming both spouses as parents of the marital child.

In sum, notwithstanding respondent's deflections, the constitutional question squarely presented by this case remains: whether Arkansas can enforce its Birth Certificate Law to require the issuance of birth certificates naming both the birth mother and her husband as parents, including when the husband has no biological relationship to the couple's child, while denying that right to married same-sex couples.

C. The Decision Below Warrants This Court's Review

Contrary to respondent's assertions, the ruling below conflicts with every other court to address the issue and remains a live issue of critical importance to petitioners individually and to similarly situated couples throughout Arkansas. Indeed, one of the petitioner couples is expecting another child and will be denied a birth certificate naming both spouses as parents under the Arkansas Supreme Court's decision.

1. Respondent's attempt to distinguish the unanimous decisions of other courts in similar cases (Br. 22-24) has no merit. Every court to consider this issue has held that, under *Obergefell*, states cannot require both spouses to be named on a marital child's birth certifi-

cate, but then limit that benefit to opposite-sex couples. See Pet. 25-27.

Respondent's attempt (Br. 23-24) to distinguish *Torres* v. *Seemeyer*, 207 F. Supp. 3d 905 (W.D. Wis. 2016), and *Roe* v. *Patton*, No. 2:15–cv–00253–DB, 2015 WL 4476734 (D. Utah July 22, 2015), has no merit. Both of those cases held that states must apply the same rules regarding the issuance of birth certificates to married same-sex couples that they apply to married opposite-sex couples. *Torres*, 207 F. Supp. 3d at 911-912, 914; *Patton*, 2015 WL 4476734, at *3-4. Respondent places great weight on the fact that the petitioners in those cases challenged laws about the parentage of children born through artificial insemination, but fails to note that they did so only because of variations between those states' statutory schemes and Arkansas's.

In *Torres*, the plaintiffs properly challenged a Wisconsin statute that addressed *both* the parentage of children born to married couples through donor insemination *and* the issuance of birth certificates for such children. See 207 F. Supp. 3d at 909. Plaintiffs argued that the statute must be applied equally to married same-sex couples, and the court agreed. See *id.* at 911-912, 914. Here, Arkansas's Birth Certificate Law mandates that both spouses be named as parents on a marital child's birth certificate, regardless of how the child was conceived. See Pet. App. 76a-79a. Accordingly, petitioners properly challenged respondent's refusal to apply that law equally to same-sex spouses.[5]

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[5] Respondent erroneously suggests (Br. 23-24) that the court in *Torres* "admonished the plaintiffs in that case for continuing to argue * * * that *Obergefell* required the court to grant much

Similarly, unlike Arkansas, Utah has no general statute expressly directing the issuance of birth certificates naming marital spouses. Instead, the Utah Department of Health had a policy of naming both spouses on the birth certificate of a child born to married opposite-sex couples through artificial insemination, based on a statute providing that a husband who consents to have a child in that manner is a legal father. See *Patton*, 2015 WL 4476734, at *2 (characterizing defendant's policy of issuing birth certificates in cases of artificial insemination as being "pursuant to Utah's assisted-reproduction statutes"). Accordingly, when the Utah Department of Health refused to place a birth mother's female spouse on the child's birth certificate, she brought suit to establish that she was a legal parent under Utah's artificial insemination law and entitled to receive a birth certificate under the Department of Health's policy enforcing that statute. *Ibid.* Nothing in *Patton* suggests it would have been improper to challenge a birth certificate statute explicitly granting spousal rights if Utah had one.

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broader relief 'on behalf of all married female couples who gave birth to a child after same-sex marriage was legalized in Wisconsin' after Wisconsin had conceded that the plaintiffs were entitled to equal treatment under the artificial insemination statute." In fact, the court merely held that "because * * * the right to list the birth mother's spouse on a birth certificate works differently under Wisconsin law depending on whether a couple conceives through artificial insemination or other means," it would only address the former circumstance, since all the plaintiffs in that case had conceived through artificial insemination. 207 F. Supp. 3d at 910. Again, in contrast, Arkansas's Birth Certificate Law applies to all children born to married couples, regardless of how they are conceived.

Respondent's attempt to distinguish *Henderson* v. *Adams*, 209 F. Supp. 3d 1059 (S.D. Ind. 2016), similarly fails. *Henderson* held that because Indiana lists both opposite-sex spouses as the parents of a child born in wedlock on the child's birth certificate, it must do so for same-sex spouses as well. *Id.* at 1076. The court expressly rejected Indiana's attempted reliance on the same rationale asserted by Arkansas here—namely, an asserted state interest in the biological accuracy of birth certificates. *Id.* at 1073-1075, 1077. In Indiana, like other states, "married women" are "allow[ed] to name their husband on their child's birth certificate even when the husband is not the biological father." *Id.* at 1075-1076. Citing *Obergefell*, the court held that "this benefit—which is directly tied to marriage—must now be afforded to women married to women." *Id.* at 1076. It is irrelevant that Indiana does not have a specific statute addressing the parentage of children born through artificial insemination. As *Henderson* and every other court to consider this question has held, under *Obergefell*, where a state confers a benefit to married opposite-sex spouses, including with respect to the issuance of birth certificates, it must afford that benefit to same-sex spouses as well.

2. Petitioners' claims remain live, and warrant this Court's immediate review. Respondent repeatedly references the fact that petitioners were granted birth certificates under the trial court's now-reversed injunction, but rightly does not suggest that this moots their case. The Arkansas Supreme Court treated petitioners' claim as a facial challenge to the Birth Certificate Law; their receipt of birth certificates pursuant to the trial court's injunction did not moot the case. Pet. App. 10-11, n.2. While individual birth certificates were

granted to these couples for specific children, the Arkansas Supreme Court reversed the circuit court's opinion and expressly held that the Birth Certificate Law does not authorize ADH to issue birth certificates to same-sex couples based on their marital status. In addition, one of the petitioner couples is expecting another child, *ibid.*, and therefore continues to be immediately and tangibly affected by this case. As a consequence of the decision below, hospitals where babies are delivered will not include the name of a birth mother's same-sex spouse when communicating to ADH the information for inclusion on a birth certificate. Only review by this Court can correct the wrong that is being inflicted on Arkansas couples, including the currently expecting petitioner couple, under the Arkansas Supreme Court's ruling.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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